

DETAILED ACTION

1. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claims 1, 9, and 17 are rejected under 35 U.S.C. 102(b) as being anticipated by Yamamori (US Patent Application Publication 2002/0122746).

Regarding claim 1, Yamamori discloses an airway adapter adapted to be attached to a carbon dioxide sensor's light emitter comprising an airway case (element 1) that is adapted to be disposed below a patient's nostrils (figures 3, 10, 11) and has an airway passage configured to extend across an optical axis of a light beam emitted from the sensor's light emitter at a position between the mouth and nostrils of the patient (element 4); and a mouth guide, adapted to be disposed in front of the patient's mouth and pivotably supported on the airway case such that it may pivot toward and away from the user's mouth (element 27 or element 59; element 59's position may be moved or pivoted about element 41c, to which it is attached on the side of the case – see figures 14 and 15).

Though Yamamori's mouth guide is not illustrated as rotating toward and away

Art Unit: 3735

from the plane of the face, it may be positioned on a patient such that it rotates toward and away from the plane of the face. The Applicant is invited to call the Examiner to discuss potential claim language that might better define the claimed invention.

Regarding claim 9, Yamamori further discloses the apparatus comprising an inlet member that is adapted to be inserted into at least one of the patient's nostrils (element 42) and having a passage for guiding exhaled gas to the airway passage (element 44; figure 13), with a vent hole (element 41b) communicating with the area external to the inlet member.

Regarding claim 17, Yamamori discloses an exhaled carbon dioxide gas sensor comprising a photo emitter (element 2); a photo receiver (element 3); and an airway adapter (element 1) supporting the two so that the light beam from the emitter is received by the receiver, where the adapter comprises an airway case (element 1) that is adapted to be disposed below a patient's nostrils (figures 3, 10, 11) and has an airway passage configured to extend across an optical axis of a light beam emitted from the sensor's light emitter at a position between the mouth and nostrils of the patient (element 4); and a mouth guide, adapted to be disposed in front of the patient's mouth and pivotably supported on the airway case such that it may pivot toward and away from the user's mouth (element 27 or element 59; element 59's position may be moved or pivoted about element 41c, to which it is attached on the side of the case – see figures 14 and 15).

Claim Rejections - 35 USC § 103

Art Unit: 3735

4. Claims 2, 4, and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yamamori in view of Cannon (US Patent Application Publication 2004/0003816).

Regarding claim 2, Yamamori discloses all the elements of the current invention, except for the mouth guide comprising a shaft member that is fitted into a hole in the airway case so that the mouth guide may pivot about the hole.

Cannon discloses a device comprising a mouth guide (element 12) and a shaft (element 24), wherein the shaft of the mouth guide is inserted into a hole in order to allow the mouth guide to pivot (Figure 1; paragraph [0023]), in order to increase the patient's comfort, since pivoting around a shaft is well known in the art. The examiner notes that the shaft of Cannon is not integrally molded as part of the mouth guide; however, the final product has the same structure, regardless of the method of formation, and therefore is not patentably distinguishable (see MPEP §2113). It would have been obvious to one of ordinary skill in the art at the time the invention was made to have made the device of Yamamori, and comprised the pivoting mechanism with a shaft inserted into a hole about which it may pivot, as taught by Cannon, in order to increase the patient's comfort.

Regarding claim 4, Yamamori further discloses forming the mouth guide of a flexible or elastic material (paragraph [0097]).

Regarding claim 5, Yamamori in view of Cannon discloses all the elements of the claimed invention, as applied to Claim 2, except for the shaft member being disposed parallel to the patient's face, and permitting rotation about the shaft, perpendicular to the patient's face.

Art Unit: 3735

Cannon further discloses that the shaft member is disposed in a direction parallel to the patient's face (Figure 1), thereby permitting rotation about it in a direction perpendicular to the patient's face (Figure 1), in order to increase the patient's comfort while wearing the apparatus. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have made the apparatus of Yamamori and Cannon with the shaft member being disposed in a direction parallel to the patient's face and permitting rotation about the shaft in a direction perpendicular to the patient's face, as taught by Cannon, in order to increase the patient's comfort while wearing the apparatus.

5. Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over Yamamori in view of Cannon, as applied to claim 2 above, and further in view of Yang (US Patent 6739218).

Yamamori in view of Cannon discloses all the elements of the claimed invention except for the shaft member being formed of a flexible material and having a size no less than the size of the hole.

Cannon further teaches forming the shaft member no smaller than the size of the hole (figures 1, 2, 5, 6), so the hinge moves securely.

Yang teaches a device comprising a shaft member that fits into a hole to allow the device to pivot. Said shaft member (element 56) is formed of a flexible material (column 4, line 73), in order to increase the resilience of the component.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have made the apparatus of Yamamori in view of Cannon

Art Unit: 3735

with a flexible shaft, as taught by Yang that is sized no smaller than its hole, as taught by Cannon, so that the components are resilient and the hinge moves securely.

Allowable Subject Matter

6. Claims 10-12 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

The prior art of record fails to anticipate or make obvious the structure of Claims 10-12, including, *inter-alia*, forming a vent hole at the junction between two tube inlet members that are adapted to be inserted into nostrils.

Response to Arguments

7. Applicant's arguments filed 17 January 2008 have been fully considered but they are not persuasive. As discussed above, Yamamori's sensor may be positioned upon a patient such that the mouth guide pivots toward and away from the face.

Conclusion

8. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is

Art Unit: 3735

filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to KAREN E. TOTH whose telephone number is (571)272-6824. The examiner can normally be reached on Monday through Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Charles Marmor, II can be reached on 571-272-4730. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 3735

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/Robert L. Nasser Jr/
Primary Examiner, Art Unit 3735

/K. E. T./
Examiner, Art Unit 3735